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No. 82-502

In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the Sixth Circuit Court of Appeals that the mere receipt of compensation benefits under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, does not trigger the assignment provision of section 933(b), warrants review by this court, particularly where there does not exist a clear conflict between the decision of Circuit Courts of Appeal with each other and with this Court?

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STATEMENT OF CASE

Respondent defers to Petitioner's Statement of the Case, except to add the following:

On June 2, 1975, thirteen days after Respondent sustained injuries on a foreign vessel, a claims adjuster for Respondent's employer issued a form entitled "Payment

of Compensation Without Award", a copy of which was served upon Respondent, and a copy of which is attached hereto. See Respondent's Appendix, A1.

The exact holding of the Sixth Circuit Court of Appeals, on the issue of whether or not an "award" had been made to Joseph Duris, Respondent herein, pursuant to the Longshoreman and Harbor Worker's Compensation Act, 33 U.S.C. 901, *et seq.*, is, "Our holding today is that the mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b). Hence, Duris' claim is not time barred." *Duris v. Erato Shipping, Inc.*, No. 81-3250, slip op. at 7 (6th Cir., Jul. 16, 1982) (Petitioner's Appendix, p. A8).

SUMMARY OF ARGUMENTS

A. The Sixth Circuit's decision was based solely on the facts before it and said facts are distinguishable from similar matters in other jurisdictions.

B. The Second Circuit has recently interpreted 33 U.S.C. 933(b). This interpretation is the result of a logical progression of interpretive theories and clearly defines 33 U.S.C. 933(b) and is consistent with the decision of the Sixth Circuit Court of Appeals in the case at bar.

C. The present matter is not special and important and therefore, does not warrant review.

REASONS FOR DENYING CERTIORARI

A. THE SIXTH CIRCUIT IS NOT IN CONFLICT WITH OTHER CIRCUIT COURTS, OR THIS COURT, IN ITS CONSTRUCTION OF 33 U.S.C. 933(b).

The proper construction of The Longshoreman and Harbor Worker's Compensation Act, 33 U.S.C. 901, *et seq.* ("Act"), and in particular, section 933(b), has been judicially debated since at least 1947. Two predominant questions have been repeatedly tendered. The first, is the time at which an assignment of benefits from an injured longshoreman to his or her employer occurs; and the second issue, from which Petitioner's Petition for Writ of Certiorari principally arises, is what constitutes an "award of benefits" within the meaning of section 933(b) of the Act.

Petitioner ultimately would have this Court hold that the mere receipt of compensation benefits constitutes an award in a compensation order and thereafter causes an assignment of all right to pursue an action against a third party unless the injured longeshoreman commences his or her action against such third party within six months after receipt of such compensation benefits. In order to accomplish that goal Petitioner requests this Court to hold that the decision of the Sixth Circuit Court of Appeals is in conflict with other similarly situated courts, as well as with this Court.

The Sixth Circuit Court of Appeals held:

> Where, as here, the injured employee has merely accepted compensation payments, no assignment occurs and the third party claim does not expire in

six months. The Second Circuit gave due consideration to the policy against unwilling assignments and reached a similar conclusion. *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955 (1980), *aff'd. on other grounds*, 451 U.S. 596 (1981).

Our holding today is that mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b). Hence Duris' claim is not time barred. *See generally Dunbar v. Retla Steamship Co.*, 484 F. Supp. 1308 (E.D. Penn. 1980). *Duris v. Erato Shipping, Inc.*, No. 81-3250, slip op. at 7 (6th Cir., Jul. 16, 1982) (Petitioner's Appendix, p. A8).

It is respectfully submitted that the Sixth Circuit decision in the case at bar is not in conflict with other Circuit Appellate Court decisions and those cases cited by the Petitioner will be discussed hereinafter. Also, we submit that the Sixth Circuit decision in *Duris* is not in conflict with this Court's decision in *Rodriguez, supra*, as Petitioner alleges, for the reason shown above by the Sixth Circuit Court of Appeals, as well as for additional reasons cited hereinafter. In point, it is the Respondent's contention that the decision of the Sixth Circuit in the instant case is consistent with the holdings of this and other courts in like circumstances.

1. This Court considered the ramifications of accepting compensation benefits under the Act in *American Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947). Respondent, Porello, suffered injuries while working as an employee of the Petitioner on a public vessel of the United States. Two weeks after sustaining the injuries, Porello began receiving compensation benefits from the Petitioner's insurance carrier, without the compulsion of an award

by a deputy commissioner. (At no time did American Stevedores, Inc. controvert the right of Porello to receive said compensation benefits.) The matter came to this Court on two issues, one which is not pertinent to the present case, and the second being whether or not Porello, by his acceptance of benefits, lost his right to sue the third party tortfeasor. This Court held, at page 455 of its opinion, "It is quite clear that the mere acceptance of compensation is not the kind of election for which provision is made by §33(a) of the Act, which provides for notice of intention to the deputy commissioner, so the argument is technically defective." Later in the decision, this Court added,

> "The apparent purpose of the Act is to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election. For these reasons we think that mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third party tortfeasor." *American Stevedores, Inc.*, 330 U.S. at 456.

In arriving at the decision, this Court stated, "Surely the Act was never intended and has never been held to provide that after acceptance of compensation, and until an award, neither employer nor employee could sue the third-party tortfeasor." *American Stevedores, Inc.*, 330 U.S. at 455. Consideration of this Court's holding in its entirety, with particular emphasis on the latter offered quotation, justifies the inference that this Court does not equate the acceptance of compensation benefits with an "award", as the term is used in section 933(b) of the Act.

Respondent respectfully submits that the decision of the Sixth Circuit Court of Appeals, in *Duris*, is consistent with this Court's holding in *American Stevedores, Inc., id.* Judge Martin, writing for the unanimous Sixth Circuit, held, "Our holding today is that the mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b)." *Duris v. Erato Shipping, Inc.*, No. 81-3250, slip op. at 7 (Petitioner's Appendix, A1, A8). Just as this Court demanded something more than the mere receipt of benefits to trigger the assignment provisions discussed in section 933(a) of the Act, the *Duris* Court demanded something more than the mere receipt of compensation benefits to effect an assignment under section 933(b). It is submitted that the *Duris* holding consistently and correctly applied the dictates of *American Stevedores, Inc., supra* at p. 4.

2. Petitioner alleges that the Sixth Circuit's decision conflicts with the Fourth Circuit Court of Appeals. In *Liberty Mutual Insurance Company v. Ameta & Company*, 564 F.2d 1097 (4th Cir., 1977), the Fourth Circuit ruled, ". . . an award under a compensation order does not require formal entry of an award *per se*. Rather, the focus should properly be upon some act of ratification of compensation, whether formal or informal, and the subsequent acceptance of compensation by the claimant." *Liberty Mutual Insurance Company*, 564 F.2d, at 1102. When applying its rule to the attendant facts, the Fourth Circuit Court held that sufficient affirmative action had occurred to constitute labeling the benefits received as an "award". The Sixth Circuit's decision, in *Duris, supra* at p. 4, is not contrary to the Fourth Circuit's rule. The different dispositions of the two cases are a result of dissimilar material facts. In *Duris*, the present Respondent was served with Form SL-206, entitled "Pay-

ment of Compensation *Without Award*" (emphasis supplied) and Form SL-208, entitled "Compensation Payment Stopped or Suspended." A review of the facts presented in *Liberty Mutual Insurance Company, id.* reflects that the claimant was given considerably more reason, via formal notice, to be aware of the effect of the monies provided to him by his employer so as to constitute "ratification of compensation." The Sixth Circuit was presented with different facts than was the *Liberty* Court and Respondent submits that it was these factual differences which resulted in the respective dispositions of each case, and not a conflict in the decisions of the Appellate Courts involved.

3. In support of its argument alleging a conflict, Petitioner mentions *Larson v. Associated Container Transportation (Australia) Ltd.*, 459 F. Supp. 561 (E.D. Va., 1978), a District Court case. It is accepted that this Court does not normally consider potential conflicts between Circuit and District Courts, as those within the meaning of Supreme Court Rule 17.1(a), but even though, Respondent suggests that no conflict exists here. *Larson, id.*, is an affirmation of *Liberty Mutual Insurance Co., supra*, at p. 6. *Larson, id.*, makes no attempt to solidify existing law, it merely applies the dictates of *Liberty Mutual Insurance Co., id.*, and disposes of the matter before it accordingly and based on the particular facts regarding that case. By considering the *Larson* Court's disposal procedure and recalling that the Court is a District Court, Respondent submits that no occasion for conflict arises between *Larson, id.* and the present matter.

4. The next chronological case cited by Petitioner to discuss the Act was this Court's decision in *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981). This decision has had a major impact on litigation arising under

the Act and is often quoted. This Court stated, in clear terms, "The only conditions precedent to the statutory assignment are the acceptance of compensation pursuant to an award in a compensation order and the passage of the required period of six months." *Rodriguez*, 451 U.S. at 603. Additionally, and more importantly, this Court stated, in footnote 3, at page 599, that despite arguments relative to whether or not an award, within the meaning of section 933(b), had been made, that ". . . for purposes of our decision, we *assume* that their [*petitioner's*] acceptance of compensation operated as an assignment under §33(b)." (Emphasis supplied). As such, this Court never reached the very issue upon which Petitioner seeks review. Quite obviously, no conflict can arise where the issues were not the same, as was pointed out by the Sixth Circuit Court in their opinion in the case at bar, at page 7 (Petitioner's Appendix, p. A8).

5. Following *Rodriguez, supra* at p. 7, the Second Circuit Court of Appeals next reviewed the meaning of the Act. By holding that "an agreement approved in a Memorandum of Informal Conference by the claims examiner after an informal conference constitutes an 'award in a compensation order' under §933(b)," the Second Circuit affirmed a District Court decision dismissing an injured longshoreman's complaint. *Ambrosino v. Transoceanic Steamship Co.*, 675 F.2d 470 (2d Cir., 1982), Without specifically mentioning, the *Ambrosino* Court applied the rule in *Liberty Mutual Insurance Company, supra* at p. 6, which stated that the "focus should properly be upon some act of ratification of compensation." *Liberty Mutual Insurance Company*, 564 F.2d at 1102. The petitioners in *Ambrosino, supra* had attended an informal conference convened by a United States Department of Labor claims examiner in the Office of Worker's

Compensation Programs. The sheer impact of such a meeting would adequately notify an injured longshoreman of ratification of compensation, much unlike the two forms received by the present Respondent, one of which stated "Payment of Compensation *Without Award.*" (Emphasis supplied). Again, Respondent submits that the case at bar is distinguishable from those offered by Petitioner, and in particular, is distinguishable from *Ambrosino, id.*, and therefore, no conflict arises. Again, Respondent respectfully submits that the different disposition of these cases is directly affected by the very clear presence of differing material facts, i.e. the extent of notice of the Longshoreman of an actual award which would trigger the assignment provisions of section 933(b) of the Act.

Further Respondent submits that the Second Circuit position on interpretation of section 933(b) of the Act is principally the same as the Sixth Circuit in the case at bar and is so shown and further discussed hereinafter at section "B".

6. In chronological order, the final case offered by Petitioner to support its conflict theory, is *Simmons v. Sea-Land Services,* 676 F.2d 106 (4th Cir., 1982). At first glance, it appears that the facts in *Simmons* are much the same as those now presented; longshoremen were injured on the job and each accepted compensation benefits without contravention by their employers. In response to these facts, the *Simmons* Court set forth a test as to when compensation equates an award, pursuant to section 933 (b):

> . . ." an award in a compensation order" is created by the completion of three events: (1) the employer, having not contravened its liability, initiates compensation payments to the longshoreman; (2) the deputy

commissioner files the employer's notice that compensation payments have been initiated; and (3) the longshoreman accepts any of the payments. *Simmons*, 676 F.2d, at 109.

In arriving at this rule, the Fourth Circuit Court of Appeals noted that the essence of an award is "an act of ratification of compensation." *Simmons*, 676 F.2d, at 109, *quoting Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097, 1102. The Fourth Circuit attempted to incorporate into its general rule this "act of ratification". Although the Sixth Circuit, in its *Duris* holding was not so explicit, it in reality did not depart from other Circuit Court of Appeals' mandates. As previously stated, the *Duris* holding is only that the "mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b)." *Duris*, No. 81-3250, slip op. at 7 (Petitioner's Appendix, p. A8) *supra* at p. 2. The *Duris* Court realized, as did the *Simmons* Court, that something more must occur than the mere receipt of benefits to effect an assignment. The Sixth Circuit decided the case before it on its particular facts; it did not, unlike the Fourth Circuit, delineate a general rule. Even so, the Sixth Circuit's holding, based solely on the facts before it, does not necessarily depart from the rule stated in *Simmons*, *id.* Both courts require something more than the receipt of compensation benefits to effectuate an award. On the facts before it, the *Duris* Court found insufficient ratification to create an "award." After considering the facts before it, the Fourth Circuit found sufficient facts to justify finding an award. The *Duris* court did not necessarily depart from the *Simmons* rule, but found that the attendant facts did not come within it. This poses no conflict of law or rules.

Respondent respectfully suggests, after a review of the foregoing, that no conflict exists between the Sixth Circuit Court of Appeals and any other court of equal or greater jurisdiction. Each case presented by the Petitioner in its Petition for Writ of Certiorari is factually distinguishable from the present matter. The Sixth Circuit has not mandated a rule in conflict with other courts; it merely determined that there were insufficient material facts presented in the *Duris, ibid.*, case to justify finding an "award", within the meaning of 33 U.S.C. 933(b); it did no more. Although it would appear that the Sixth Circuit places greater emphasis upon the statutory language, in particular the word "award," it is respectfully submitted that the Sixth Circuit Court is making it clear that it believes a "broad interpretation of section 33 would vitiate the policy behind its narrowly precise language." *Duris, id.*, p. 7. Although not reciting the exact test elements espoused by another Circuit Court of Appeals, it is expressing its position of taking a strict stance relative to interpreting said statutory language and in applying any such test, whether it be "ratification of compensation" or the "Simmons rule". *Simmons, ibid.*

Although the various Circuit Courts of Appeals may establish their own guidelines or tests for such statutory interpretation, in so doing they are not necessarily setting standards for all other Circuit Courts to adhere to rigidly. Each case presents differing material facts which require judicial flexibility. The exercise of such flexibility accordingly does not create conflicts which would require the intervention of this Court. Respondent respectfully submits that the case at bar is such a case. For that reason; namely, that, in reality, there is no conflict present between the Circuit Court decisions, that the Petition for Writ of Certiorari be denied.

B. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IS CONSISTENT WITH AND INDISTINGUISHABLE FROM RECENT HOLDINGS IN THE SECOND CIRCUIT.

In January and April of 1982, the Second Circuit Court of Appeals reviewed the Longshoreman and Harbor Worker's Compensation Act, 33 U.S.C. 901, *et seq.* in *Verderame v. Torm Lines*, 670 F.2d 5 (2d Cir., 1982) and *D'Amico v. Cia De Nav. Mar. Netumar*, 677 F.2d 249 (2d Cir., 1982), respectively. The two cases are factually distinguishable from each other and the present matter; however, the Second Circuit mandated a rational rule which consistently held that an injured longshoreman must know or be given notice that compensation payments will be construed as an "award" under section 933(b) of the Act in order for the assignment provisions to come into effect. Respondent suggests that the Second Circuit's holdings are and should be the applicable law to such matters, that these holdings are the logical outcome of years of litigation and that the Sixth Circuit's decision in *Duris*, *supra* at p. 2, is not conflicting.

The *Verderame*, *supra*, case involved an injured longshoreman who received interim payments under a "Payment of Compensation *Without Award*" (Emphasis added) procedure. Three years later, the petitioner was served with a form entitled "Compensation Order—Award of Compensation". Respondent herein respectfully requests this Court to recall that he, too, received a form entitled "Payment of Compensation *Without Award*". (Emphasis added). The Second Circuit, in reversing the District Court, stated:

> In the first place, the notice of payment expressly stated that it was "without award" which would nor-

> mally preclude its being treated as an "award" as that term is used under §33(b). But regardless of the labels, Verderame at that point did not know how much he would eventually receive by way of insurance compensation and therefore was not sufficiently informed to be able to decide whether a damage suit against the shipowner would be advisable. *Verderame*, 670 F.2d at 7.

The *Verderame* Court, similar to the Sixth Circuit, demanded that something more occur than the receipt of benefits in order to activate the "award" provision of section 933(b). It also, as was the Sixth Circuit Court herein, very concerned that the longshoreman be aware of the circumstances surrounding his situation so as to be able to make a knowledgeable decision.

Similarly, in *D'Amico*, *supra* at p. 12, the Second Circuit, when presented with a situation where a *pro se* longshoreman received interim compensation and then negotiated and agreed to a final settlement, stated, in reversing the district court's dismissal of the longshoreman's complaint:

> It is not clear that Plaintiff knew or can be charged with knowing the legal implications of accepting a final compensation. He was not represented by counsel, and neither the carrier's nor claims examiner's letter contained any reference to the six month limitation period. Moreover, it is not clear from the record that the settlement payment was made "under an award" by the deputy commissioner as provided in §33(b). *D'Amico*, 677 F.2d at 251.

Again, the Second Circuit would not allow the mere acceptance of benefits to trigger the assignment provisions

of 33 U.S.C. 933(b); something more (i.e., notice) was required.

The decisions of the Second Circuit are consistent with the Sixth Circuit. Both Courts have fully considered the plight of the injured longshoreman as well as the well-being of shipowners and their insurers. Respondent respectfully submits that the correct and applicable law defining 33 U.S.C. 933(b) is found in the Second and Sixth Circuits, this recent law is the cumulation of years of litigation, from various Circuits and lays a foundation for the future understanding and application of the provisions of the Act. Further, Respondent submits that the aforementioned information reflects that there is in reality, no conflict between the Circuit Appellate Courts and decisions of this Court.

C. THE SIXTH CIRCUIT COURT OF APPEALS' DECISION DOES NOT WARRANT REVIEW.

It is respectfully submitted that the case at bar, to quote Rule 17.1 of the Supreme Court Rules, does not present "special and important reasons" for the granting of a Writ of Certiorari.

As has been stated hereinabove, the Sixth Circuit based its decision solely on the facts before it. It did not create a general rule of law which will cause consternation between the circuits or for those attempting to interpret 33 U.S.C. 933(b). Only when the exact same facts again arise will the *Duris* Court's decision have applicability. The Court's attention is respectfully directed to *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813 (1931), where it was stated by this Court, "It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of

law, the Writ of Certiorari is dismissed as improvidently granted."

Additionally, as set forth in part two of this argument, the Second Circuit has recently expressed rules which are consistent with the logical progression of litigation concerning 33 U.S.C. 933(b).

This Court stated in *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923), "The jurisdiction [of the Supreme Court to review cases by way of Certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty percent of those who petition for Certiorari do not appreciate the necessary limitations upon our issue of the Writ." Petitioner respectfully suggests that the present Petition for Writ of Certiorari is one of the "eighty percent" which does not warrant review.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKMEN'S COMPENSATION PROGRAMS

PAYMENT OF COMPENSATION WITHOUT AWARD

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AS EXTENDED

OMB No. 44-R0001

1. CASE NUMBER: 211-52 3062

NOTE: *This notice is to be filed with the Deputy Commissioner when the first payment is made. A copy should be sent to the person to whom compensation was paid.*

2. NAME OF INJURED PERSON (First, middle, last)
Joseph E. Duris

3. ADDRESS OF INJURED PERSON (Number, street, city, state and zip code)
1207½ Nevada Street Toledo, Ohio

4. DATE OF ACCIDENT OR FIRST ILLNESS (Month, day, year)
May 19, 1975

5. DATE DISABILITY BEGAN (Month, day, year)
May 19, 1975

6. NAME OF INJURED OR DEPENDENTS OF INJURED TO WHOM COMPENSATION WILL BE PAID
Joseph E. Duris

7. AVERAGE WEEKLY WAGE $ 99.00 MULTIPLIED BY 2/3 = COMPENSATION RATE $ 66.57
(State if maximum rate is being paid) 74.57

8. COMPENSATION WILL BE PAID FROM (Month, day, year) 5-20-75
Compensation in the amount of $149.14 will be paid every two weeks.

UNTIL NOTICE IS GIVEN THAT PAYMENT HAS BEEN STOPPED OR SUSPENDED

9. DATE OF FIRST PAYMENT (Month, day, year)
First payment will be paid June 2,1975 to cover 5-20-75 through 6-

10. MEDICAL CARE AND TREATMENT HAS BEEN [X] HAS NOT BEEN [ ] PROVIDED BY A PHYSICIAN OR HOSPITAL CHOSEN BY INJURED PERSON (Check appropriate box).

11. NAME OF EMPLOYER
Edward J. DeCartolo Corp., Toledo Overseas Terminal, Inc.

12. ADDRESS OF EMPLOYER (Number, street, city, state and zip code)
3319 St. Lawrence Drive
Toledo, Ohio 43605

13. NAME OF INSURANCE CARRIER
Seaboard Fire & Marine – Underwriters Adjusting Company

14. AUTHORIZED SIGNATURE
Allan R. Locy X

15. TITLE OF PERSON WHOSE SIGNATURE APPEARS IN ITEM 14
Claims Adjuster

16. DATE SIGNED
06-02-75

GPO 000-000

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Form 1
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